Oden Mechanical Contractors, Inc. *and* Plumbers & Pipefitters Local Union No. 165, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. Case 17–CA–20933

October 26, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On April 5, 2001, Administrative Law Judge Jane Vandeventer issued the attached bench decision. The Respondent filed exceptions and a supporting brief, the Union filed a responding brief, and the Respondent filed a responding brief to the Union's responding brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Oden Mechanical Contractors, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants for employment concerning their union activities or sentiments.

WE WILL NOT tell applicants for employment that they will not be hired if they are union.

WE WILL NOT tell applicants for employment that they will not be hired because of the Union.

WE WILL NOT refuse to consider for hire or to hire applicants for employment because of their union activities or sentiments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[1] We reject the Respondent's contention that the judge erred by refusing to permit the Respondent to file a posthearing brief prior to the issuance of the bench decision. In its brief, the Respondent, apparently relying on a long-outdated version of the Board's Rules, erroneously claims that Sec. 102.42 of the Board's Rules states that "[a]ny party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both with the administrative law judge, who may fix a reasonable time for filing, but not in excess of 35 days from the close of hearing." Had the Respondent accurately quoted the current version of Sec. 102.42, it would have revealed that there is no support for its contention that the judge's ruling was in error. Sec. 102.42 of the Board's Rules, as amended 61 Fed. Reg. 6940 (1996), provides "*[i]n the discretion of the administrative law judge*, any party *may*, upon request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge, who may fix a reasonable time for filing, but not in excess of 35 days from the close of the hearing." (Emphasis added.)

We find no merit to the Respondent's contention that it was denied due process by the judge's denial of the Respondent's motion to produce certain material, known as "COMET material," pertaining to the Union's training of its organizers. The subpoena was directed to the Union's assistant business agent and organizer, James Cox, who testified that he did not have the COMET materials in his possession and that he has never seen the material in the Union's office. In view of Cox's testimony, the judge properly denied the Respondent's motion to produce.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also modify the notice to conform it to the language in the Order.

WE WILL offer employment to James Cox, Dan Droge, and Kirk Miller, and WE WILL make them whole for any loss of pay or other benefits they may have suffered because of our unlawful refusal to consider them for hire or to hire them.

ODEN MECHANICAL CONTRACTORS, INC.

Richard Auslander, Esq., for the General Counsel.
Rayford T. Blankenship and *Jonathan P. Sturgill, Esqs. (R. T. Blankenship & Associates),* for the Respondent.
Michael Stapp, Esq. (Blake & Uhlig), for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on April 4 and 5, 2001, in Overland Park, Kansas. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by interrogating applicants for employment, and by telling applicants for employment that they would not be hired because of the Union and that they would not be hired if they were union. The complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by failing to consider for hire and failure to hire three applicants for employment. On April 5, 2001, after hearing oral arguments by all counsel, I issued a bench decision pursuant to Section 102.35(1)(10) of the National Labor Relations Board's Rules and Regulations, setting forth findings of fact and conclusions of law.

Respondent objected to the issuance of a bench decision. I overruled Respondent's objection since the case was, according to the guidance provided by the Board, particularly appropriate for a bench decision. The parties had been given notice of my intention to issue a bench decision in a conference call on the morning of March 30, 2001, should the case prove appropriate under the Rule, which notice allowed the parties 4 days in which to prepare arguments. The case required only 1 day of trial to complete the evidentiary presentation, and much of the evidence was uncontroverted. The case law governing the issues in the case is also well settled.

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 215 to 231, containing my bench decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

Exceptions may not be filed in accordance with Section 102.46 of the National Labor Relations Board's Rules and Regulations, but if they are not timely or properly filed, Section 102.48 provides that my bench decision shall automatically become the National Labor Relations Board's Decision and Order.

CONCLUSIONS OF LAW

1. By interrogating employees about their union sentiments, telling employees it will not consider them for hire if they are union, and telling employees it will not consider them for hire because of the Union, Respondent has violated Section 8(a)(1) of the Act.

2. By refusing to consider for hire and refusing to hire James Cox, Dan Droge, and Kirk Miller because of their union activities or affiliation, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to offer employment to James Cox, Dan Droge, and Kirk Miller. I shall also recommend that Respondent be ordered to remove from the employment records of these three employees any notations relating to the unlawful action taken against them and to make them whole for any loss of earnings or benefits they may have suffered due to the unlawful action taken against them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Oden Mechanical Contractors, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating applicants for employment concerning their union activities or sentiments, telling applicants for employment that they will not be hired if they are union, and telling applicants for employment that they will not be hired because of the Union.

(b) Refusing to consider for hire or to hire applicants for employment because of their union activities or sentiments.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employment to James Cox, Dan Droge, and Kirk Miller.

(b) Make James Cox, Dan Droge, and Kirk Miller whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the three employees named above and, within 3 days thereafter, notify the employees in writing that this has been done and that the initial refusal to hire them will not be used against them in any way.

[1] I have corrected the transcript containing my bench decision.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Fort Riley, Kansas location copies of the attached notice marked "Appendix C." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 6, 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

BENCH DECISION

JUDGE VANDEVENTER: I have now heard oral argument by Government Counsel, Company Counsel and the Charging Party, Union Counsel and am prepared to issue a bench decision in the case. For the record, it is Oden Mechanical Contractors Inc. and Plumbers and Pipe fitters Local Union No. 165 affiliated with the United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. That's case 17–CA–20933. I will refer to the Plumbers and Pipe fitters Local 165 as "the Union," for the most part in this decision as their name is rather long.

The case has been tried on two days, April 3 and 4, 2001 in Overland Park, Kansas. And I am issuing this bench decision pursuant Section 102.35(a)(10) of the National Labor Relations Board Rules and Regulations. And I shall set forth Findings of Fact and Conclusions of Law herein. I would note that the Rule provides that promptly upon receiving the transcripts, I will

216

review, correct and certify the pages containing the bench decision and issue that in a written form under my signature. And only when that document issues will the time for exceptions begin to run.

The Complaint in this matter alleges that the Respondent violated Section 8(a)(1) of the Act by variously interrogating employees about their Union membership, telling employees they would not be considered for hire if they were members of the Union or because of trouble Respondent was having with the Union. And the Complaint further alleges violations of Section 8(a)(3) in that it was alleged that the Respondent violated—I'm sorry—refused to consider for hire or hire two applicants for employees, applicants for employment, Jim Cox on July 10 or thereabouts - all dates in 2000—Dan Droge on or about September 7 and Kirk Miller on or about September 11.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying and the documentary evidence and in fact the entire record, I will make the following Findings of Fact.

First, in terms of jurisdiction, Respondent is a corporation with an office and place of business in Wichita Falls, Texas, that is engaged in the construction industry in commercial installation of plumbing and related products. During the representative period, one-year period, the Respondent has performed work valued at over 50,000 dollars for

217

customers outside the state of Texas and has performed mechanical contracting work for those customers. In addition, it has been performing such work, including the re-plumbing and renovation of barracks, called the Barracks Upgrade Program, and referred to in this record as the Custer Hill barracks, at the U.S. Army base in Fort Riley, Kansas, which will be referred to as the "Fort Riley project."

In addition, during a representative one-year period, the Respondent has purchased and received at the Fort Riley project materials valued in excess of 50,000 dollars from points located outside the state of Kansas. And, I find that the Respondent of course has admitted in its answer that it is an employer engaged in commerce within the meaning of Section 226 and 7 of the Act. And, likewise, that is not being contested and I find that the Union is a labor organization within the meaning of Section 25 of the Act.

In terms of the background to this, it's mostly undisputed. Respondent did begin work on the Fort Riley, Kansas project in December 1999 on the Custer Hill Barracks Renovation Project. Respondent has employed approximately three to eight plumbers at the journeyman level in addition to various laborers and other less-skilled employees on this same project. Mr. Steve Allen is the Superintendent and has been the Superintendent at that project.

Others involved in this case: Mr. Jim Cox, who is a

218

journeyman plumber and was throughout at least between January 2000 and I believe December of 2000, working as an Assistant Business Agent and Organizer in that capacity as he visited—I'm sorry, let me correct myself. I believe January 2000 and January 2001 for—it may be as much as the entire year, was working as the Assistant Business Manager, Business Agent, and Organizer for the Union. In that capacity, he visited Mr. Allen at the Fort Riley job site several times between January and April of 2000, and, on those occasions, offered to supply skilled employees to Respondent. Mr. Allen declined, that offer.

Mr. Phillip Petty was an Organizer for—an arm of the International Union in the Midwest Area called Missouri, Iowa, Nebraska, Kansas Organizing Project at least during the spring and summer of 2000, the times involved herein. On approximately the end of March, approximately the 31st of March, Mr.

Petty faxed a letter to the President of Respondent, Mr. Oden, informing him that the Union had skilled employees available and in fact that two of its skilled employees were working on the project at Fort Riley.

A few days later, he and Mr. Cox went to the Fort Riley project and again spoke with Mr. Allen, informing him as well, handing him a copy of the letter, informing him that Mr. Smith and Mr. Shepard, two employees on the Fort Riley project, happened to be Union members. There is—the events are not

219

in dispute with—except perhaps with regard to whether Mr. Allen was upset and/or angry at learning that there were two Union members working on the Fort Riley project.

Both Cox's and Petty's testimony agrees that Allen gave outward signs of being upset, such as clenching his fists, being red. I do credit Mr. Cox and Mr. Petty on this one point. Otherwise, the events are not really in dispute. Mr. Cox and Mr. Petty again offered skilled employees to Mr. Allen who declined. There were subsequent discussions between Mr. Petty and Mr. Allen on the same subject and on the subject of the Union, signing a Union contract, and, again, within a week or two those conversations resulted in Mr. Allen telling Mr. Petty that he did not wish to sign a contract.

A little after that, around the 18th of April, Mr. Cox did put in an application and/or resume to Mr. Allen and told him that he wanted to work for him and assured him he would do a good job. In response to Mr. Allen's expressed doubts that he could work for the Union at the same time he could work for the Company, Mr. Cox assured him that he could and he would work for the Company and do a good job. Allen then responded that he would consider Mr. Cox although he didn't have any openings at the time.

Nothing of importance to this case happened until early July at which time, approximately early July, about the 6th of July, in all likelihood, Mr. Petty visited the job site again

220

and spoke with Mr. Allen again about supplying manpower and/or the contract. Allen again refused and it appears to be not in dispute that at that time Mr. Petty—these events are actually really more background to the allegations of the Complaint that they do have some bearing—Mr. Petty said words to the effect of, "I've helped you all that I can help you."

Both Mr. Allen and Mr. Petty substantially agree that Petty made a remark such as that, very close to that. Allen's testimony, Mr. Allen's testimony, included a couple more remarks that he attributed to Petty. Petty denied those remarks. I do credit Petty on the denial of the additional remarks. It appears from the evidence overall that based on Mr. Petty's remark, "I've helped you all that I can help you," Mr. Allen assumed that the two employees that had been working on the job site for some three or four months at that time, Mr. Smith and Mr. Shepard, were not going to be working for him anymore. He testified that he then went and got their checks and took them their paychecks a day early and gave the employees their paychecks. It is really not—I think the record evidence that we have is insufficient to determine whether the employees were in fact laid off by this action of Mr. Allen, whether they quit or whether in accordance with a remark they made to Mr. Allen they went on strike for recognition.

It need not be determined which of these things was the

221

fact. First of all, because the record's insufficient. Secondly, it's not alleged and it is only relevant as background to the later events. It is undisputed that Mr. Allen assumed that they were quitting and/or striking at the behest of the Union, and that his belief was to that effect. It is not in dispute.

Another item of background that has been explored in the evidence is the laborer Mr. Cleaves, who had been working for Respondent for three or four months, from about April until sometime in July or August of 2000, who was at the time not a Union member, resigned from his employment with Respondent in order to become an apprentice under the auspices of the Union - giving Mr. Allen what he felt was short notice of his quit. Although Mr. Allen didn't argue with his desire to advance his career in the trade, he was not happy with the short notice that he believes Mr. Cleaves had given him.

Subsequently, in early September, I believe the first incident was placed at approximately September 7, it is undisputed that it was early in September, Jim Cox and Dan Droge visited the job site. Dan Droge is also a journeyman plumber of more than 20 years experience. He testified about his qualifications in detail. That testimony is uncontradicted. Mr. Cox also testified about his qualifications and has eight or ten years as a journeyman plumber. And both of them visited Mr. Allen on the job site at Fort Riley on this date, approximately September 7.

222

Mr. Droge was to all appearances, a very careful and conscientious witness, listened carefully to questions and appeared to be making every effort to answer as accurately as possible. In addition, Mr. Allen basically admitted that what Droge testified to was what had happened. I do credit Droge if there is any variation in the testimony between Droge and Mr. Allen; but, I think there is very little, if any, difference.

Mr. Cox and Mr. Droge basically asked Mr. Allen if they could apply for jobs and, as Mr. Droge testified, Mr. Allen said that he wouldn't hire Mr. Cox because of the trouble he was having with the Union and went on to detail his complaints against Mr. Cleaves and Mr. Shepard and Smith. He told—when Mr. Droge asked to fill out an application, Mr. Allen told him he could fill one out; but, it didn't matter because if Mr. Droge were Union, he would not be considered for employment. Mr. Allen admitted that both Mr. Cox and Mr. Droge were qualified for the type of work being performed at Fort Riley.

A few days later, on about the 8th, according to Mr. Miller, Mr. Kirk Miller applied for work at Fort Riley and spoke with Mr. Miller there—I'm sorry, with Mr. Allen there. After speaking with Mr. Allen about the fact that—asking if he was hiring and Mr. Allen said yes he was, they reviewed the qualifications of Mr. Miller and in testimony, Mr. Allen admitted that Mr. Miller was, in fact, qualified for the work being performed at Fort Riley. They discussed the wage being

223

paid. Mr. Allen told Mr. Miller the wage rate and said that he was replacing a couple of men that the Union had pulled off and asked Mr. Miller if he had anything to do with the Union. Mr. Allen went on to—after Mr. Miller said, "No, do I have to?" Mr. Allen went on to complain that the Union had pulled men off his job and that he thought it was bullshit.

A few days later, the following Monday, Mr. Miller brought an application, a completed application, to Mr. Allen. Mr. Allen took it and put it in his truck and drove off; but, later contacted Mr. Miller on Mr. Miller's telephone later that day and said to him, "I thought you said you weren't Union." And gave his opinion that the Hall wouldn't let Mr. Miller work for Respondent. Mr. Miller assured him that he was able to work for Respondent and assured Mr. Allen that he would do a very good job for him. Mr. Allen told Mr. Miller that he would check with Mr. Cox and get in touch with him later. According to Mr. Miller, he did not hear again from Mr. Allen and was not hired.

Turning to the law in this area, first let's discuss—I want to discuss the allegations contained in paragraph 5 of the Complaint, the Section 8(a)(1) allegations. The first one that appears in the Complaint is the latest one in time, the questioning of Mr. Miller about whether he has anything to do with the Union. That was not denied.

I find that in fact the questioning took place and under the Board's standard, enunciated in Rossmore House (phonetic),

224

it was coercive. The Board has long held that the routine questioning of applicants for employment as to their Union membership or sympathies has often and repeatedly been held to be coercive. Just for completeness, Rossmore House, the cite is 269 NLRB 1176 (1984). And the cases which deal specifically with interrogation in the context of an employment interview, some of those cases are for example, ADCO Electric Inc., 307 NLRB 1113 at 1117 (1992). Other cases involving the same issue, Contractor Services Inc., 324 NLRB 1254 (1997), M.J. Mechanical Services Inc., 324 NLRB 812 (1997), Q1 (phonetic) Motor Express Inc., 323 NLRB 767 (1997).

The other two allegations in paragraph 5 are—the credited testimony of Mr. Droge shows that Mr. Allen did ask, or state, to Mr. Cox and Mr. Droge that Cox would not be hired because of his troubles with the Union and Mr. Droge would not be hired if he were Union. Again, this was not controverted. And again, to tell employees that they are not going to be hired because of Union affiliation or because of an employer's unhappiness with the Union hardly needs a citation and it is coercive of employees and it does violate Section 8(a)(1) of the Act.

Turning to paragraph 6, the refusal to consider for hire and/or hire employee applicants of whom there are three, Cox, Droge and Miller, alleged, I want to first mention the Board's recent case in F.E.S., which is admirably summarized in a quite

225

recent case called Fluor Daniel Inc. and I think it's possibly Fluor Daniel three, four or five, I'm not sure which. I'll give you the cite for it. It's Fluor Daniel Inc., 333 NLRB No. 57, issued on March 2, 2001.

MR. STRAPP: It's Fluor 3.

JUDGE VANDEVENTER: I'm sorry?

MR. STRAPP: It's Fluor 3.

JUDGE VANDEVENTER: It's Fluor 3? Fluor Daniel 3, thank you. On page 11 of the opinion, the Board itself summarizes the standards set forth in F.E.S., the cite to which is 331 NLRB No. 20 (2000). And it holds that to establish a prima facie case, the Government must establish that the Respondent, one, that the Respondent was hiring or had concrete plans to hire at the time of the alleged conduct; two, that the applicants had experience or training relevant to the announced or generally known requirements of the positions; and three, that anti-Union animus contributed to the decision not to hire the applicants.

And then of course, if the General Counsel succeeds in establishing those, the Respondent may defend on traditional Wright Line principals. And, Wright Line I ought to have memorized; but, I don't. However, I believe it is 251 NLRB 1083 (1980). To complete the cite, enforced 662 F 2nd 899, First Circuit 1981, cert. denied 455 U.S. 989 (1982).

So, applying the principles enunciated so recently by the Board to the facts here, Mr. Allen

226

testified that he did have openings that occurred within a short time after Mr. Cox had put in his application and that he did have job openings that he filled within some time after Mr. Droge and Mr. Miller applied in September of 2000. He also in his testimony stated that Mr. Cox, Mr. Droge and Mr. Miller were qualified for the type of work that was being performed at Fort Riley. So the first two elements of the Board's test have been, I think, met without any really contradictory evidence.

The third test, the causation or nexus test, is subject to argument by the parties. The General Counsel and the Union have urged that the evidence concerning Mr. Allen's statements against the background of what went on in the spring and summer and his statements in September, that his animus concerning hiring of employees associated, or applicants associated, with the Union, is shown. On the other side, Respondent urges that despite full knowledge that Mr. Shepard and Mr. Smith were associated with the Union, he kept them employed and did not terminate them. Certainly there is evidence on both sides of this issue.

Analyzing the evidence and weighing it, however, I'm going to find that there is a nexus established. While in fact Mr. Allen did not fire two employees that he already had and valued, he also did not knowingly hire any of the Union, open Union, members who applied, openly stating they were Union members and repeatedly displayed animus, beginning in April of 2000,

227

continuing in July and certainly evidenced by his statements to the applicants in early September against the idea of hiring any people associated with the Union.

If anything, his animus appeared to increase based on his association─rightly or wrongly, it doesn't matter to this record─his association of the departure of Mr. Shepard and Mr. Smith from the job site with the Union's activities because he believed that the Union had caused that and clearly resented it as shown by his repeated statements that the Union had caused him trouble and engaged in "Bullshit," and other statements of that sort. Hence, despite the fact there is evidence on both sides, I do find that there is a nexus and a showing that there is a causal connection between─in other words, a third prong of the test has been established. And I find that General Counsel has made out a prima facie case.

Respondent has defended on a couple of grounds that the Employer had the right to, one, keep its business, protect its business from being harmed and had a reasonable basis for believing that pulling men off the job site might harm its business and do it economic harm. In fact, let's take one at a time. In terms of the economic─let's take the economic harm first. While in fact any sensible business person tries to guard against economic harm, it may not do so at the expense of employees' protected rights.

For example, it's not permitted to refuse to

228

reinstate all strikers because one or two strikers may have engaged in misconduct. That misconduct has to be attributed to a particular person assuming there is misconduct. Which, again, is an assumption because this record doesn't show the goal was misconduct on the part of any of the applicants, certainly, and in my view, does not show there was misconduct on the part of Mr. Shepard, Mr. Smith or Mr. Cleaves, certainly not conduct which is prohibited under the Act or analogous to something like strike misconduct.

In fact, lumping together of any Union applicant with even hypothetical people that may have engaged in misconduct in the past, it's essentially painting all Union people─simply for affiliation with the Union, painting them with the misdeeds of other individuals. The law does not find that that is a permitted defense. The risk of economic harm is intrinsic, in some employee rights. If employees conduct an economic strike against an employer, it may indeed do the employer economic harm. That does not entitle the employer to fire employees or discharge employees or refuse to rehire them or reinstate them or refuse to hire them because they might have engaged in a strike or they might in the future engage in a strike. That argument is not under Board law a defense to a refusal to hire or reinstate employees.

Although the objective, the business objective, of eliminating any risk of strike from its business may make

229

superficial sense, in fact, if an employer were privileged to refuse to hire any employee it suspected might sometime in the future engage in a strike, that is in fact interfering with the employee's right to engage in a strike.

Just one quick word about the Agency argument. Again, the Respondent's Agency argument has been dealt with by the Supreme Court with regard to paid Union organizers, full-time Union organizers, such as in this case, Mr. Cox was. In Town & Country Electric, the cite of which─for you, Mr. Stapp─516 U.S. 85, a 1995 case, that assuming they go to work and do the work assigned to them - which in fact in that case, the assumption was that they were to do that─in this case, the facts show Mr. Cox assured Mr. Allen that he was ready, willing and able to do that. They are to be treated as any other applicants. Respondent in this case has extended that argument even further than the Chamber of Commerce did in Town & Country by claiming that even Shepard and Smith as mere Union members could be considered to be agents. That's certainly an unwonted extension, an extension of an argument that would have been, that didn't even need to get to the Supreme Court. That has been rejected not only in Town & Country, but numerous cases prior to that.

In sum, I find that the Respondent's asserted defense of fear of harm to its business and economic harm and fear that potential Union members might at some future time either quit or

230

strike is not a valid defense and does not rebut the prima facie case that has been established. Hence, the prima facie case stands and I find that the failure to hire Cox, Droge and Miller for openings that have been admitted to exist did violate Section 8(a)(3) of the Act.

And based on all foregoing, I will make the following Conclusions of Law.

CONCLUSIONS OF LAW

JUDGE VANDEVENTER: One, by interrogating employees about their Union sentiments, telling employees it won't consider them if they are Union or because of trouble with the Union, Respondent has violated Section 8(a)(1) of the Act.

Two, by refusing to consider or consider for hire and to hire James Cox, Dan Droge and Kirk Miller, Respondent has violated Section 8(a)(3) of the Act. And the violations set forth above are unfair labor practices effecting commerce within the meaning of the Act.

As to remedy, having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist there from and to take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that Respondent offer employment to James Miller─I'm sorry, Kirk Miller, James Cox and Dan Droge and make them whole for any loss of earnings or benefits they may have suffered to the unlawful actions against them in

231

accordance with F.W. Woolworth Company, NLRB 289 (1950) plus interest as computed with New Horizons for the Retarded 283 NLRB 1173 (1987).

Upon these Findings of Fact and Conclusions of Law and on the entire record, will issue the following recommended order. That Respondent, Oden Mechanical Contractors Inc., its officers, assigned successors, agent successors and assigns shall cease and desist from interrogating applicants about their Union support, telling employees that they will not be considered for

hire because of the Union or if they are Union, be refusing to hire or consider for hire employees because of their Union support or affiliation. C, in any like or related manner, interfering with restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act to take the following affirmative action necessary to effectuate the policies of the Act. A, offer employment to Kirk Miller, James Cox and Dan Droge [inaudible] and does not [inaudible] now.

And, with that, I thank the parties for their cooperation in the presentation of a cogent and excellent presentation of this case and the record will be closed.

(Whereupon, the hearing in the above entitled matter was concluded)